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IN THE

Supreme Court of the United States

OCTOBER TERM

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL [illegible],

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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And its Local 511

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 511

PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in Case No. 7781 therein on June 26, 1959.

OPINIONS BELOW

The Intermediate Report of the Trial Examiner and the findings of fact, conclusions of law and the decision and order of the National Labor Relations Board, issued Octo-

ber 21, 1958, is reported in 121 NLRB No. 185. (BA 1-17). The Opinion of the Court of Appeals, which is reprinted in Appendix "A" hereto is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 26, 1959. (Appendix "B" hereto.) The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED

1. The ultimate question presented by the decision of the Court of Appeals is whether picketing and the conduct of a consumer boycott by employees, represented by a certified union, who have gone out on an economic strike and have been replaced by a new force of employees who voted the Union out in an election based upon a consolidated employee decertification petition and employer petition, and when no other union has been certified, is violative of Section 8 (b) (1) (A) of the Labor Management Relations Act, 1947, hereinafter referred to as the "Act".

2. Subsidiary questions, involved in the determination of this ultimate question, are:

(a) Whether the judgment of the Court of Appeals infringes upon Petitioners' right of freedom of speech guaranteed by the First Amendment of the Constitution of the United States.

(b) Whether the activity prohibited by the judgment and decree of the Court of Appeals is lawful and

The parties filed separate Appendix records in the Court below. References to Petitioners' Appendix, Respondent in Court below, are designated "RA". Numbers following are to pages thereof. References to Board Appendix, Petitioner in Court below, are designated "BA". Numbers following are to pages thereof.

protected activity under Section 8 (c) of the Labor Management Relations Act, 1947.

(c) Whether a lawful economic strike is converted, ipso facto, under the provisions of the Labor Management Relations Act, 1947, into an illegal strike by the conducting of an election by the National Labor Relations Board in which replacements vote and strikers do not.

(d) Whether the judgment and decree of the Court of Appeals deprives Petitioner of its right to strike under Section 13 of the Labor Management Relations Act, 1947.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States. The pertinent provisions of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C., Sec. 151, et seq., are Section 2 (3), (9), Section 7, Section 8 (b) (1) (A), Section 8 (b) (4) (A), (B), (C) and (D), Section 8 (c), Section 9 (c) (3), and Section 13. (See Appendix "C" for text of cited Constitutional Provision and Statutes).

STATEMENT

The United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, hereinafter referred to as the "International Union," is a labor organization representing employees in the rubber, cork, linoleum and plastic industries throughout the United States and Canada, through its affiliated Local Unions. (RA 19 through 30, and Exhibits Nos. 4, 5, 6, 7, 8, 9). Local 511 is a local union affiliated with the International Union. The International Union and Local 511 shall be referred to collectively herein as the "Union."

The O'Sullivan Rubber Corporation, hereinafter referred to as the "Company," is a corporation owning and operating a plant manufacturing rubber heels, shoe soles and plastic materials in Winchester, Virginia. It is engaged in an industry affecting commerce and is subject to the Labor Management Relations Act, 1947.

From around 1942 to 1956, the production and maintenance employees of the Company were represented by Rubber Workers Local 22770, a Federal Labor Union, affiliated directly with the American Federation of Labor. On March 20, 1956, the International Union filed a petition with the National Labor Relations Board, hereinafter referred to as the "Board," which, through a consent agreement, resulted in an election being conducted on April 4, 1956. Of approximately 388 eligible voters in that election, 313 votes were cast for the International Union and 2 votes were cast against it. On April 21, 1956, the Board issued its certification of representatives certifying that the International Union had been designated as the exclusive representative of the production and maintenance employees of the company. (BA 3).

Shortly thereafter, Local 511 was chartered to perform the functions of bargaining agent for the employees of the Company and contract negotiations which had previously been started, continued between representatives of the Union with representatives of the Company. Those negotiations began in April 1956, and periodic meetings were held through May 11, 1956, but no agreement was reached. A strike called by the Union commenced on or about May 11, 1956, and between that date and April 1, 1957, when the last bargaining session was held, there were approximately 27 meetings held, but no agreement was consummated. (BA 3, 4).

Beginning May 11, 1956, and continuing until the present

date, pickets have been stationed by the Union at the entrance of the Company's plant in Winchester, Virginia. During the early stages of the strike and until approximately one month following October 18, 1957, (the date of another Board election) three different signs were used by the pickets, bearing the following legends (BA 1):

WARNING
PENALTY FOR STRIKEBREAKING
A LIFETIME OF SHAME AND REGRET

URW LOCAL 511 AFL-CIO
ON STRIKE MAY 1956 TO ?
DON'T BUY O'SULLIVAN PRODUCTS
HEELS MADE BY A COMPANY
WITHOUT A SOUL

LOCAL ON STRIKE 511
UNITED RUBBER WORKERS AFL-CIO
OUT SINCE MAY 13, 1956 — DON'T
BUY O'SULLIVAN PRODUCTS MADE BY
STRIKEBREAKERS

Since on or about one month following October 18, 1957, until the present time pickets have used two signs which bear the following legend:

A.F.L. Local 511 URC-PWA C.I.O.
On Strike Since May 13, 1956
O'SULLIVAN RUBBER CORPORATION
Unfair to Organized Labor

A.F.L. Local 511 URCLPWA C.I.O.
On Strike Since May 15, 1956
DON'T BUY
O'SULLIVAN RUBBER CORPORATION
HEELS, SOLES, PLASTIC PRODUCTS
MADE BY STRIKEBREAKERS

At no time since October 28, 1957 (the date of issuance by the Board of its certification of results in the election of October 18, 1957) have the pickets, which have been stationed at the entrance of the plant, been in such number as to physically block or impede the voluntary ingress and egress of the employees or other persons having business to do with the Company; nor have the pickets, since October 28, 1957, engaged in any violence or other conduct designed to physically impede or obstruct the voluntary ingress and egress of employees or other persons having business to do with the Company. (BA 4, 5).

When the strike began on May 14, 1956, the Company had a complement of 420 employees in the production and maintenance unit, of whom only 8 appeared for work, and 412 did not on that date. Between May 14 and July 16, 1956, there returned to work an additional 72 employees. Of the 420 employees on the payroll the day of the strike, a total of 80 employees (about 19%) returned to work by July 16, 1956, and 340 employees continued on strike. Between May 14 and July 16, 1956, the Company hired a total of 265 persons who had never worked for it before. Thus, on July 16, 1956, a new full complement of persons was maintained by the Company totaling 345. Since that date to the date of the hearing by the Trial Examiner, March 4, 1958, any

changes in the work complement were a result of normal attrition, resignations and hirings. (BA 5).

On April 26, 1957, the Company filed a petition with the Board alleging the existence of a question of representation among its production and maintenance employees, which petition was docketed as Case No. 5-RM-351. Thereafter, on May 1, 1957, a decertification petition was filed by Mrs. Ann Louise Agnor, an employee of the Company, alleging that a substantial number of O'Sullivan employees no longer desired to be represented by the Union, which petition was docketed as Case No. 5-RD-153. Said petitions were consolidated and a hearing was held, following which the Board ordered an election among the Company's production and maintenance employees. (BA 5).

In it's Decision and Direction of Election, issued on September 26, 1957, the Board rejected the Union's contention that all strikers who had not returned to work would be eligible to vote in the election, holding that, "As the record is clear that the employees who went on strike are economic strikers who have been permanently replaced, we find they are not eligible to vote." (BA 5).

In the election held on October 18, 1957, of 325 eligible voters, 5 votes were cast for Local 511 and 288 against it; and there was one void ballot and one challenged ballot. On October 28, 1957, the Board issued its certification that the majority of the ballots had not been cast for the Union. (BA 6).

Following the loss of this Board election, the Union continued after this date, October 28, 1957, a primary consumers' boycott initiated by the Union in January, 1957. (BA 8; BA

37. General Counsel Exhibit No. 8). This boycott was carried out through advertising signs, and advertising and articles in the Union's regular publication—"The United Rubber Workers". (BA 7, 8). The Union also continued to peacefully picket the Company's plant at Winchester, Virginia. (BA 4, 5).

Pursuant to charges filed by the Company in Case No. 5-CB-268, the General Counsel of the Board issued a complaint on February 12, 1958, alleging violation by the Union of Section 8 (b) (1) (A) of the Act. A hearing was conducted in Winchester, Virginia, on March 4, 1958. Thereafter, on October 21, 1958, the Board issued its Decision and Order adopting the rulings of the Trial Examiner in his Intermediate Report, together with its conclusion that the Union violated Section 8 (b) (1) (A) of the Act.

Thereafter, on November 1, 1958, the Board petitioned the United States Court of Appeals for the Fourth Circuit for enforcement of its Order.

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict between the decision of the United States Court of Appeals for the Fourth Circuit in this case and the decision of the United States Court of Appeals for the District of Columbia in the case of *Drivers Local No. 639 v. NLRB (Curtis Brothers)*, November 26, 1958, 43 LRRM 2156, (cert. granted, 27 LW 3291) and the decision of the United States Court of Appeals for the Ninth Circuit in the case of *International Association of Machinists vs. NLRB (Alloy Mfg. Co.)*, 263 F. 2d 796. The first cited decision involved the issue raised by the continued peaceful picketing of an employer's plant by a union after the loss of a

National Labor Relations Board conducted election where the strikers had been replaced.

The latter case turned on the issue of the legality of the maintenance of a "Do Not Patronize List" by a union subsequent to the loss of a National Labor Relations Board election. The instant case involves both issues, to wit: peaceful picketing and the maintenance of a consumer product boycott subsequent to the loss of a Board election where those voting were replacements and the strikers were denied the right to vote.

In *Curtis Brothers, supra*, the NLRB found, as it did in this case, that the picketing by the union constituted a violation of Section 8 (b) (1) (A) of the Act. The Court of Appeals for the District of Columbia denied enforcement of the Board Order.

In *Alloy Mfg. Co., supra*, the NLRB found, as it did in this case, that the "Do Not Patronize List" (consumer boycott) maintained by the Union constituted a violation of Section 8 (b) (1) (A) of the Act. The Court of Appeals for the Ninth Circuit denied enforcement of the Board Order.

In this case the NLRB found that the picketing and the consumer boycott constituted a violation of Section 8 (b) (1) (A) of the Act. The Court of Appeals for the Fourth Circuit enforced the Board's Order.

There is, therefore, a sharp and direct conflict between the decision in this case and the decisions of two other Courts of Appeals on the specific question herein.

2. The question presented here is an important question of federal law which has not been settled by this Court.

The legal issue in this case, the scope and application of Section 8 (b) (1) (A) of the Act in protecting or prohibiting concerted activity of labor organizations involved in disputes with employers engaged in interstate commerce within the meaning of the Act, is clearly one of serious national concern. Section 8 (b) (1) (A) was one of the 1947 amendments to the National Labor Relations Act of 1935. During the nine years following incorporation of Section 8 (b) (1) (A) into the Act, its provisions were not considered, by applicable Board decisions, to prohibit the concerted activity involved in this case. *National Maritime Union*, 78 NLRB No. 971; *Perry Norvell Co.*, 80 NLRB 225.

Obviously, there has been and is a wide divergence of opinion about what Congress intended by the words it used in Section 8 (b) (1) (A) of the Act. For nine years the agency created by the Act, the National Labor Relations Board, was of the opinion that the language did not prohibit a labor organization from picketing or boycotting an employer where the union had lost its bargaining rights under the circumstances in this case. Did Congress intend to deprive a union whose members were replaced during a lawful labor dispute of the right to exert economic pressure to obtain reinstatement of strikers to their former jobs? If such was the intention of Congress in Section 8 (b) (1) (A), then labor organizations are confronted with unanticipated problems which necessitate a new appraisal of the situation when an economic strike is contemplated.

When a labor organization and its membership consider a strike to enforce its demands for better wages, working con-

ditions, or other conditions of employment, the risks involved must be given consideration. One of those risks is the possibility of the employer replacing the strikers. However, until the Board departed from its prior interpretation of Section 8 (b) (1) (A) in *Curtis Brothers, supra*, labor organizations properly indulged the presumption that they could lawfully continue to picket and engage in other activities to advertise the unfairness of the employer.

Did Congress intend to deprive unions and their membership of their right to strike (including picketing and boycotting) under Section 13 of the Act by the simple device of a Board conducted election during a hitherto lawful strike in which replacements voted and strikers were denied the right to vote? If such was the intent of Congress, it is respectfully submitted that this Court should determine the question so that labor unions will know how to evaluate the course of their conduct in future labor disputes.

It is of imperative importance to labor organizations involved in labor disputes with employers engaged in interstate commerce to have the important Federal question decided by this Court whether the expression of views, argument and opinions, and the dissemination thereof constitute a violation of Section 8 (b) (1) (A), notwithstanding Section 8 (c) of the Act, in the event the union loses its majority status during the course of the dispute by an election in which the strikers are not permitted to vote and no other bargaining agent is designated.

The Board's current construction of Section 8 (b) (1) (A) strikes deep into an area heretofore considered inviolate as protected by the First Amendment. The United States Court of Appeals for the Ninth Circuit in refusing enforcement of

the Board's Order insofar as it prohibited listing of Alloy Mfg. Co.. (*International Association of Machinists, Lodge* 942 *vs. NLRB, supra*), on the "We Do Not Patronize" list and the importuning of consumers not to patronize Alloy did not find it necessary to pass on the constitutional issue, but recognized the constitutional import of the Board's current construction of Section 8 (b) (1) (A) in the following language: (pp. 799-800).

> "We consider the conduct of Union of listing and persuasion, excepting picketing, to be within the general area of protection of the 1st Amendment guarantying freedom of speech. These aspects are more protected than picketing which although within said area, 'exert influences and produces consequences different from other modes of communication.' Hughes v. Superior Court (1950), 339 U.S. 460, 465, 70 S. Ct., 718, 721, 94 L. Ed. 985. In order to adopt the Board's finding as to the illegality of Union's action now under consideration, we would need a clearer mandate from Congress than the general terminology of the applicable statutes. If such a mandate be given, it then would be the time to consider any constitutional questions raised."

Therefore, for reasons stated above, it is respectfully submitted that the question presented here is an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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ATTORNEYS FOR PETITIONER

United Rubber, Cork, Linoleum and Plastic
Workers of America, AFL-CIO
And its Local 511

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7781

NATIONAL LABOR RELATIONS BOARD,
Petitioner

versus

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO
And its Local 511,
Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued March 9, 1959. Decided June 26, 1959.)

Before Sobeloff, Chief Judge, and Soper and Haynsworth, Circuit Judges.

Duane B. Beeson, Attorney, National Labor Relations Board; Jerome D. Fenton, General Counsel; Thomas J. McDermott, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Melvin J. Welles, Attorney, National Labor Relations Board, on brief for Petitioner, and James O. Cross and Garnet L. Patterson Arthur J. Goldberg on brief for Respondents.

Soper, Circuit Judge.

The question in this case is whether a labor union was guilty of unfair labor practices in violation of §8(b)(1)(A) of the National Labor Relations Act as amended, 29 U.S.C. §151 et seq., when it picketed the plant of an employer and conducted a boycott campaign in order to force the employer to recognize the Union as the bargaining representative of its employees in spite of the fact that the Union had been rejected by the employees in a Labor Board-conducted representative election. The Board concluded, upon the facts hereinafter stated, that the Union had violated §8(b)(1)(A) of the Act by restraining and coercing the employees in the exercise of rights guaranteed by §7 of the Act by picketing the Company for the purpose of obtaining recognition and a contract as the exclusive representative of the Company's employees, when the Union did not represent a majority of the employees. The Board issued an order directing the Union to cease and desist from such activities and also from conducting a boycott campaign against the Company's products for the purpose of forcing the Company to recognize the Union as the exclusive representative of the employees, or of forcing the Company to enter into a contract with the Union when it did not represent a majority of the Company's employees.

The O'Sullivan Rubber Corporation is engaged in the manufacture and sale of rubber soles and heels at Winchester, Virginia. From 1942 to 1946, its production and maintenance employees were represented by Rubber Workers Local 22770, affiliated with AFL. On March 20, 1956, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, petitioned the Board for an election, which was held by consent on April 4, 1956, and resulted in a vote of 343 votes for and 2 against the petitioner out of a total of 388 eligible voters. Accordingly, on April 12, 1956, the Board certified the Union as the exclusive representative of the workers and shortly thereafter Local Union No. 511 was chartered to service the employees. Contract negotiations were then carried on from April 1956 until May 11, 1956, but no agreement was reached. A strike was called on May 14, 1956, and 27 bargaining sessions were held up to April 1, 1957, but no agreement was consummated. Picketing of the plant was begun on May 14, 1956, and

has since been carried on continuously and was still in operation at the time of the examiner's hearing two years later.

When the strike began the Company had 420 employees of whom 8 appeared for work and 412 did not. During the next two months 72 additional employees returned to work and the Company hired a total of 265 persons who had never worked for it before, so that on July 16, 1956, the Company had a complement of 345 workers and has since carried on active operations.

On September 26, 1957, as the result of petitions filed by the employer and one of the employees in the previous April, indicating that the employees no longer desired to be represented by the Union, the Board ordered that an election be held and decided that the employees who had gone on strike were economic strikers who had been permanently replaced and were therefore ineligible to vote. On October 18, 1957, the election was held and out of a total of 325 eligible voters, 5 voted for the Union and 288 voted against it. Accordingly, the Board, on October 28, certified that the majority of the ballots had not been cast for the Union.

From the beginning of the picketing on May 14, 1956, until a month after the election on October 18, 1957, the picketers carried signs which contained the warning that the penalty of strikebreaking was a lifetime of shame and regret, and alleged that the products of the Company were made by strikebreakers and by a company without a soul and urged the public not to buy the Company's products. Thereafter the picketers used signs which stated that the local union had been on strike since May 13, 1956, and that the Company was unfair to organized labor and urged the public not to buy the Company's products made by strikebreakers.

Since October 28, 1957, the picketers at the entrance of the plant have not engaged in any violence or other conduct designed to impede the voluntary ingress and egress of employees or other persons having business with the Company, and they have not been present in such numbers as to accomplish such purposes.

The Personnel Manager of the Company testified that all of

the negotiations between the Company and the Union related to attempts to reach a contract and that the Union had not indicated in any manner to the Company that there had been any change in the issues since the negotiations were terminated on April 1, 1957.

On October 16, 1957, on the eve of the election, the Local Union published an advertisement in a Winchester newspaper which appealed to the employees to vote for the Union and stated that the strike and boycott would continue regardless of the outcome of the election until the Company reached an agreement with the Union in a satisfactory settlement of the issues involved in the strike.

A reporter for the newspaper testified that after the results of the election were published he was told by the field representative of the International Union that the strike and boycott would continue although the Union had lost the election, and a statement to this effect was published in the newspaper in the evening of that day and has not been challenged. In November 1957, a leading article appeared in a publication of the Union, known as "The United Rubber Worker," which contained a statement of the General President of the United Rubber Workers that the consumers' strike against the products of the Company was continuing in the struggle of the Local Union for a contract with decent wages and working conditions. A reprint of this article was distributed by the Union to 10,000 shoe repair shops in various states and directed the attention of all shoe men to the fact that the strike and the boycott were still on.

In January 1958, a news story from Atlantic City, where the Constitutional Convention of AFL-CIO was being held, noted the unanimous approval by the delegates of a resolution supporting the Union in its consumer boycott of the Company. The article stated in part that the Union had spearheaded the consumer strike because the Company had stubbornly refused to consider a fair and reasonable contract with the Local Union.

On the basis of the foregoing evidence the Board found that the Unions continued to seek a contract with the Company despite the loss of the election on October 18, 1957. The Board therefore held

that the Unions, notwithstanding their minority status, continued their economic sanctions of picketing and boycotting in the period after the election for the purpose of compelling the Company to *recognize* them as the *representatives* of the employees who had decisively rejected them.

The opposing testimony of the Unions as to their intentions after the election was found unconvincing and insufficient by the Board. Representatives of the Unions testified that their original objective was changed after they lost the election, and that after the result of the election was certified by the Board on October 28, 1957, they ceased to seek recognition as to the bargaining representative in order to obtain a contract covering the employees and continued their efforts merely to obtain reinstatement for the replaced strikers. The Board rejected this testimony in view of the postelection activities and statements of the Unions above referred to. We are bound by this finding since it is clear that there was substantial evidence on the record as a whole to support it.

The substantial question in this case is whether the exertion of economic pressure by a union upon an employer by picketing and boycotting in order to secure recognition as the bargaining representative of the employees and to secure a contract from the employer after the employees have rejected the union in a Board-conducted election is a violation of §8(b)(1)(A) of the statute. The first paragraph of §8(b) declares that it shall be an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed by §7 of the statute, which includes the right to bargain collectively through representatives of their own choosing, and also the right to refrain from any or all such activities, that is, to refrain from union representation altogether.

The Board in support of its conclusion that the Unions' conduct was a violation of the statute, quoted a passage from its prior decision in *Curtis Bros.*, 119 NLRB 232, 236, on November 4, 1957, wherein, departing from its earlier decisions in 1948 in *National Maritime Union*, 78 NLRB 971 and *Perry Norvell*, 80 NLRB 225 it first interpreted the statute to cover minority picketing for recognition. It said, Page 236:

"* * * the pressure [exerted by such sanctions] is necessarily an economic one, a device to reduce the business to the point where his financial losses force [the employer] to capitulate to the union's demands. It is immaterial whether the ostensible technique, or the unspoken but necessary consequence is to cut off the employer's labor supply by preventing the employees from reporting to work; to keep the customers from buying his products; or to interrupt deliveries of supplies to the premises. The important fact of the situation is that the Union seeks to cause economic loss to the business during the period that the employer refuses to comply with the union's demands.

"And the employees who choose to continue working, while the union is applying this economic hurt to the employer, cannot escape a share of the damage caused to the business on which their livelihood depends. Damage to the employer during such picketing is a like damage to his employees. That the pressure thus exerted upon the employees—depriving them of the opportunity to work and be paid—is a form of coercion cannot be gainsaid. There is nothing in the statutory language of Section 8(b)(1)(A) which limits the intendment of the words 'restrain or coerce' to direct application of pressure by the Respondent Union [upon] the employees. The diminution of their financial security is not the less damaging because it is achieved indirectly by a preceding curtailment of the employer's interests."

See also the Board's decision in *Alloy Mfg. Co.*, 119 NLRB 307, reversed in part sub nom, *NLRB* v. *International Assn. of Machinists*, 9 Cir., 263 F.2d 796.

We are in accord with the Board's decision. The basic purpose of the National Labor Relations Act of 1935, as shown by the preamble contained in §1, was to protect the right of employees to organize for the purpose of collective bargaining so that they might have equal bargaining powers with their employers; and in order to accomplish this purpose, it was provided in §8(a)(1)(A) and §7 of the Act that it would be an unfair labor practice for the em-

ployer to interfere, restrain or coerce employees in their right to bargain collectively and to choose their representatives for this purpose, free from the control of the employer. This statement of the policy of Congress was repeated in the Taft-Hartley Act of 1947, 61 Stat. 136. In the meantime the right of employees to organize and bargain collectively through unions of their own choice free from interference by their employers had been so firmly established by the decisions of the courts that Congress recognized that the unions, as well as the employers, might intrude upon the rights of employees and therefore the statute should be amended to subject them also to restraint under the administration of the Labor Board. Accordingly, the correlative §8 (b) (1) (A) was enacted to prohibit conduct that amounted to unfair labor practices on the part of union organizations.*

When the facts found by the Board in the pending case are considered, there can be no doubt that the actions of the Union after the election were designed to coerce the workers to choose the Union as their bargaining representative and thus deny them the right of free choice bestowed upon them by the statute. The Company had lawfully filled the places of the workers who had struck for economic purposes and the new men had rejected the Union by an overwhelming majority in a fair election conducted by the Board. Nevertheless, the strike went on continuously, the new employees were held up to scorn as strikebreakers, and the security of their employment was jeopardized by the appeal to the public to refrain from purchasing the Company's products. This attempt to frustrate the purpose of the Act was the more glaring in that the repudiation of the Union by the workers had been formally established and, although the attempt failed, it was none the less an unfair labor practice condemned by the Act.

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* See Universal Camera Corp. v. Labor Board, 340 U.S. 474, 484-490; Auto Workers v. Wisconsin Board, 351 U.S. 266, 272. The legislative history supports this description of the general purpose which Congress had in mind in enacting the amendment now codified as §8(b)(1)(A). See Sen. Rep. 105, 80th Cong., 1st Sess. p. 50, I Leg. Hist. 456; II Leg. Hist. 1018, 1021, 1028, 1032, 1199, 1203, 1206-07.

In *Building Service Employees International Union, Local 262, et al. v. Gazzam*, 339 U.S. 532, the Supreme Court upheld an injunction issued by a state court against the peaceful picketing by a labor union of an employer to compel him to coerce his employees in their choice of a bargaining representative. The injunction was issued because the activities of the union constituted an attempt to induce a transgression of the state's policy against coercion by an employer. The picketing took place after the employees had voted against joining the union. Recognizing that the picketing by the union was a violation of the state law, the Supreme Court said (pp. 538-9):

> "* * * Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the State here restrained the advocates of such transgression from further action with like aim.* * *"

This description of the coercive effect of picketing under the circumstances described supports the finding of the Labor Board that the picketing by the Union in the pending case had a similar coercive effect.

It can hardly be denied that the economic pressure exerted in this case upon the employer and through it upon the employees falls literally within the terms of §8(b)(1)(A); but it is said that this construction of the statute is not tenable since it conflicts with other sections of the law. First, it is pointed out that §13 declares that, except as specifically provided, nothing in the Act shall be construed to interfere with, impede or diminish in any way the right to strike, and it is contended that picketing as well as striking is covered by this section. Reference is made to the decision in *NLRB v. International Rice Milling Co.*, 341 U.S. 665, where it was held that an attempt, accompanied by acts of violence, by pickets of an uncertified union to influence the driver of a truck of a neutral customer to refrain from going to the picketed plant for goods did not amount to an inducement to the employees of the customer to engage in *concerted* action on their part designed to interfere with the rights of the employees of the picketed plant in violation of

§8 b 4 of the Act. We do not think that this decision lays down the rule that the right to picket is the same as the right to strike or that coercive measures by a union should be condoned which are designed to interfere with the free choice of employees in the selection of a bargaining representative or in abstaining therefrom. Surely the Supreme Court did not intend to give its approval to the violent acts of the picketers. On the contrary the Court pointed out that to reach the charge of violence the complaint should have been based on §8 b 1 A, which is invoked in the pending case. The order of the Board now under review does not interfere with the Union's right to strike. It is directed against the picketing of a plant after the loss of an election, accompanied by acts of economic pressure to coerce the employees to recognize the Union against their will. Everyone agrees that violent conduct by picketers designed to accomplish this result is forbidden by §8 b 1 A and the language of the section, when interpreted in view of the purposes of the Act, is broad enough to include all other coercive conduct which the Board finds sufficient to interfere with the independent choice of the employees.

Secondly, it is pointed out that the statute contains specific prohibitions against certain forms of coercive conduct, which would include picketing, and hence it is contended that other conduct, such as that employed by the Union in this case, must be lawful even if it falls within the condemnation of the general terms of §8 b 1 A. One of these prohibitions is contained in §8 b 4, C of the Act, which amongst other things makes it an unfair labor practice for a labor organization to engage in a strike or to encourage the employees of any employer to engage in a strike in order to force the employer to recognize it as the representative of his employees if another labor organization has been certified by the Labor Board as the representative of the employees under §9 of the Act.

It is argued that if §8 b 1 A is given a broad application so as to cover coercive striking and picketing, §8 b 4, C would become entirely useless because all of the activities therein described would be covered by the former section. This was the view expressed by the Court of Appeals of the District of Columbia in *Drivers' Local No. 639 v. N.L.R.B.*, November 26, 1958; 43 LRRM

2156, cert. granted 27 L.W. 3291, in which the court reversed a decision of the Labor Board which held that a union which did not claim to represent a majority of the employees was guilty of an unfair labor practice under §8(b)(1)(A) when it engaged in the peaceful picketing of a plant where no union had been certified. We do not think that this argument justifies the robbing of §8(b)(1)(A) of the meaning to which its terms entitle it. The circumstances under which this section was inserted in the Act support the view that it should be given a broad interpretation in order to protect employees from coercive conduct not only of the employer but also of labor organizations. When the statute was first reported out of committee in the Senate it contained §8(b)(4)(B) and (C) but did not contain §8(b)(1)(A).* Five members of the committee, including Senators Taft and Ball, were of the opinion that the bill was not stringent enough to regulate certain union activities and accordingly sought amendments on the floor which resulted in the addition of the last named section. Hence it may fairly be recognized as an enlargement of the bill originally reported so as to make provision for circumstances not covered by §8(b)(4)(B) and (C) as originally incorporated therein. See S. Rep. 105, 80th Cong., 1st Sess., pp. 50-56, 1 Leg. Hist. pp. 456-462; Senate 1126, 80th Cong., 1st Sess., p. 15, 1 Leg. Hist., p. 113.*

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* The effect to be given to the legislative history of the proceedings of Congress in interpreting §8(b)(1)(A) has been much in dispute. The majority of the Labor Board expressed the opinion in Drivers Local 639 (Curtis Bros.), 119 NLRB 232, that the legislative history supports their interpretation while the dissenting member and the examiner took the opposite position. References to the proceedings of Congress bearing on the subject are set out in the majority and minority opinions. A similar division of opinion exists between the decision of the court of the Ninth Circuit in Capital Service v. N.L.R.B., 204 F.2d 848, and the decision of the District of Columbia Court in Drivers Local No. 639 v. N.L.R.B., November 26, 1958, 43 LRRM 2156. Under these circumstances it is not surprising to find that law writers regard the legislative history as inconclusive. See Bornstein, Organizational Picketing, 46 Ky. L.J. 25, 57-61; Note 42, Minn., L.R. 459, 473. To some extent those who hold to the narrower interpretation of the section rely upon the post-legislative history contained in the report of the Watchdog

The two sections may be distinguished by the fact that different remedies for their enforcement have been provided in the statute. Section 10 (l) provides that whenever it is charged that any person has violated §8 (b) (4) (C) and reasonable ground to support the charge has been found upon preliminary investigation, an application must be made to the appropriate Federal District Court for temporary injunctive relief pending final adjudication by the Board. On the other hand, the right to invoke injunctive relief for violations of §8 (b) (1) (A) is vested in the Board by §10 (j), which empowers the Board in its discretion upon the issuance of a complaint of unfair labor practice to petition the United States District Court for temporary relief or restraining order. In view of the complicated situations which the statute is intended to cover, it seems unreasonable to cripple the remedial provision contained in §8 (b) (1) (A) merely because there is some overlapping of its scope with that of other sections of the statute.

Again, it is contended that the use of the consumer boycott by the Union in this case, whether coercive or not, cannot be regarded as a violation of §8 (b) (1) (A) because §8 (c) of the Act authorizes "the expressing of any views, arguments or opinion, or the dissemination thereof whether in written, printed, graphic or visual form shall not constitute or be evidence of an unfair labor practice, under the provision of this Act, if such expression contains no threat

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Committee of 1949, 80th Cong., S. Rep. 986, Pt 3, p. 70-71, which in turn relies on decisions of the Labor Board in 1948 and 1949, which announced a policy that the present Board declines to follow. In United States v. Mine Workers, 330 U.S. 258, the Court disapproved the use of debates after the passage of an act as authoritative guides to its construction. In United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62, references to postlegislative history were referred to in the opinion of the Court. In Labor Board v. Lion Oil Co., 352 U.S. 282, 291, a 1948 report by the Joint Committe on Labor-Management Relations was referred to by the Court but it was expressly stated that it did not constitute a part of the legislative history of the 1947 Act.

of reprisal, force or promise of benefit."* Freedom of speech, however, does not furnish a conclusive answer to the problem, for the right of free speech in general does not justify the encouragement or incitement of a breach of law. *Fox v. Washington*, 236 U.S. 273, 277. Thus it has been held specifically that peaceful picketing is not protected as an exercise of the constitutional right of free speech if its object is to violate a state law. In *International Brotherhood of Teamsters, Local 695, A.F.L., et al. v. Vogt, Inc.*, 354 U.S. 284, where the Court upheld the validity of a state law forbidding peaceful picketing to coerce an employer to put pressure on his employees, contrary to the public policy of the state, to join a union, the Court said (page 289) that picketing by an organized group is more than a communication of ideas or freedom of speech since the very presence of the picket line may induce action irrespective of the ideas that are being disseminated. Similarly, in *International Brotherhood of Electrical Workers et al. v. N.L.R.B.*, 341 U.S. 694, it was held, notwithstanding the rights of free expression accorded by §8(c) of the statute, that it was an unfair labor practice, under §8(b)(4)(A), for a union to engage in peaceful picketing to induce union employees to strike in order to force a general contractor to terminate his contract with a nonunion subcontractor.

The Court said, page 704-5:

> "c. The remedial function §8(c) is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing in furtherance of unfair labor practices such as are defined in §8(b)(4). The general terms of §8(c) appropriately give way to the specific provisions of §8(b)(4)."

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* In N.L.R.B. v. International Ass'n. of Machinists, 9 Cir., 263 F.2d 796, it was held that the actions of a union in listing an employer on its "We Do Not Patronize List" and in urging others not to do business with him were protected by the First Amendment and did not constitute unfair labor practice.

In like manner, §8 (c) should be so interpreted as not to nullify the protection accorded to employees by §8 (b) (1) (A) of the statute.

Whatever may be said as to the coercive force of peaceful picketing for purposes of persuasion and the application thereto of the prohibitions contained in §8 (b) (1) (A), we entertain no doubt that coersion of employees in restraint of the right to an independent choice of a bargaining representative is found in a case like the present where the Union has been decisively rejected in a formal election conducted under the auspices of the Board and yet persists in a continuous and long drawn out strike, accompanied by picketing, wherein the employees are described as strikebreakers and appeals to the public not to purchase the products of the employer are made not only by participants in the picket line but also in widespread publications directed to the public generally and specifically to the customers of the employer.

The order of the Board will be enforced.

Sobeloff, Chief Judge, dissenting:

Whether or not the existing law forbids peaceful picketing or the publication of "We Do Not Patronize" advertisements by a union, after employees in an election have rejected the union without choosing another, is not readily determinable by a mere reading of the statute. As the majority opinion recognizes, the legislative history is also inconclusive, each side of the controversy being able to cite expressions by Senator Taft and others to support its arguments.

According to the administrative interpretation which persisted for nine years, these practices were not forbidden by the Taft-Hartley Act. It was so stated in 1948 by the Labor Board in *Perry Norvell*, 80 NLRB 225. The "Watchdog Committee" of the Congress, created under Title IV of the Taft-Hartley Act to study its operation and effect, acquiesced in this determination of the Board. The Committee declared that it would be inadvisable

until after "further experience" to broaden Sec. 8 (b) (4) (C), which makes it an unfair labor practice for a union to picket for recognition after another union has been certified. The Committee did not intimate the opinion that Sec. 8 (b) (1) (A) already covered a case like this, and it advised against expanding Sec. 8 (b) (4) (C) "the logical place for such a provision" to cover cases where no union has been certified.

While the Supreme Court declared in *Labor Board v. Lion Oil Co.*, 352 U. S. 282, 291 (1957), that the 1948 committee report is no part of the legislative history of the statute enacted in 1947, it nevertheless, in support of its interpretation, noted the views contained in that report. The views expressed in the committee report were again cited in *Newspaper Pub. Assn. v. Labor Bd.*, 345 U. S. 100, 108 fn. 8 (1953).

I find further and even more persuasive evidence in the recent vigorous and extended Senate debate on the Kennedy-Erwin Bill. 105 Cong. Rec. 5951-5978. Both its proponents and opponents seem to have predicated the discussion upon the view that the present law has not proscribed these practices. The tenor of the arguments advanced by Senators who condemned such conduct was that there is a present need to amend the law to make these practices illegal.

The Board argues that the opinion expressed by the "Watchdog Committee" merely reflected the Committee's reading of the Board's *Perry Norvell* decision; but such an argument cannot dispose of the recent debate in the Senate. For despite the Board's 1957 reversal of its *Norvell* decision, in *Curtis Bros., Inc.*, 119 NLRB No. 33, and *Alloy Mfg. Co.*, 119 NLRB No. 38, the action of the Senate indicates that the present Act was not considered to prohibit the conduct here involved. At no time in the long debate was it intimated by anyone that what was proposed was merely declaratory of existing law.

This accumulation of opinion among the legislators seems to me significant. In this situation I do not think it is for us to declare the

law in accordance with our independent judgment as to what it should be, however persuasive the arguments for such a change.

I fully agree that neither the First Amendment nor Sec. 8 (c) protects speech under all circumstances, and assume for present purposes that Congress may in instances like this forbid picketing and even boycotting. Cases in which under similar circumstances the Supreme Court has upheld injunctions were decided under state statutes, and the Supreme Court expressly said that it made no independent construction of the statutes but accepted the interpretation of the State Courts. *Building Service Union* v. *Gazzam*, 339 U.S. 532 (1950); *Teamsters Union* v. *Vogt, Inc.*, 354 U.S. 284 (1957). See also, *Pappas* v. *Stacey*, 113 Me. 36, 116 A.2d 497 (1955), appeal dismissed, 350 U. S. 870. These cases answer the contention that such restrictions are unconstitutional; they do not deal with the issue before us, whether by Sec. 8 (b) (1) (A) Congress enjoined the conduct here under attack.

I do not attribute to Sec. 8 (b) (1) (A) the far reaching effects claimed for it. It is not too much to require that such a legislative purpose be expressed clearly and unequivocally. The peaceful expression of views should not be condemned by a new administrative interpretation of statutory language which can just as easily be construed, and for a long time was construed, not to require this result.

In Sec. 8 (c) Congress has made plain its purpose to protect freedom of speech. Indeed, it would appear that in enacting Sec. 8 (c) Congress meant to give assurance that Sec. 8 (b) (1) (A) was not to be as sweeping as its language standing alone might suggest. The Court's opinion holds that in the present circumstances Sec. 8 (c) must yield to Sec. 8 (b) (1) (A), but is seems to me that any derogation of the broad protection of Sec. 8 (c) should be expressed in more specific language than is to be found in Sec. 8 (b) (1) (A). In *Electrical Workers* v. *Labor Board*, 341 U. S. 694 (1951) where Sec. 8 (c) was held to be qualified by Sec. 8 (b) (4) the Supreme Court was careful to point out that "[t]he *general* terms of Sec. 8 (c) appropriately give way to the *specific*

provisions of Sec. 8 (b) (4)." (704-705). Emphasis supplied. Section 8 (b) (1) (A) contains no specific language forbidding the conduct that is challenged here, and in this respect significantly differs from Sec. 8 (b) (4), which in unmistakable terms condemns certain secondary boycotts and other specifically enumerated acts.

I find the opinion of the Ninth Circuit in *NLRB* v. *International Ass'n. of Machinists, Inc.*, 263 F.2d 796, very persuasive. In that case, the Court refused to interpret Sec. 8 (b) (1) (A) as prohibiting consumer boycotts, while indicating no opinion as to picketing because the point had not been properly reserved below. The Court of Appeals for the District of Columbia Circuit has rejected the Board's present interpretation in respect to picketing. *Drivers' Local No. 639* v. *N.L.R.B.*, November 26, 1958, 43 LRRM 2156, cert. granted 27 LW. 3291. We are called upon to answer the question of picketing as well as boycott.

The possibility of a distinction between picketing and boycotting has been suggested, that is to say, that picketing may be illegal under the general language of Sec. 8 (b) (1) (A), while boycotting, since it falls more directly within the general area of freedom of speech is in a more protected status, at least until Congress attempts more specifically to forbid it. However, the language of Section 8 (b) (1) (A) admits of no such distinction, and must be interpreted as directed to both or to neither. Such a grouping presents no problem, for even picketing which the Supreme Court has said is more than mere speech, *Teamsters Union* v. *Vogt, Inc.*, 354 U. S. 284, 289, contains elements of speech and communication, and therefore should not lightly be held to have been outlawed.

In dealing with this problem Congress may or may not recognize a difference between a case where the union has never represented the employees and continues to picket after they have rejected it in an election and another case, where, as here, the employees represented by a certified union have gone out on an economic strike and been replaced by a new force of employees who vote the union out in an election based upon a decertification petition. In the latter situation the union may be thought by Congress to

have equities which warrant protection. Whether these and other equities which may arise in a particular instance deserve protection, are considerations to be resolved by the legislative branch, not by us. Pending Congressional clarification, I would hold that peaceful picketing and publishing "We Do Not Partonize" advertisements by a minority union, when no other union has been certified, have not been condemned as unfair labor practices within the meaning of Sec. 8(b)(1)(A).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7781

NATIONAL LABOR RELATIONS BOARD,
Petitioner

versus

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO
And its Local 511,
Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO and its Local 511, and their officers, representatives, agents, successors and assigns, on the 21st day of October, 1958, in a proceeding before the said Board numbered 5-CB-268, entitled "United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, and its Local 511"; upon the answer of respondents; upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and the same is hereby, enforced; and that the said United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, and its Local 511, and their officers, representatives, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

June 26, 1959.

MORRIS A. SOPER
United States Circuit Judge

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

FILED
JUNE 26, 1959
R.M.F. WILLIAMS, JR.
CLERK

I dissent:

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

A true copy,

Teste:

Richard M. F. Williams, Jr., Clerk.
U. S. Court of Appeals for the
Fourth Circuit

By Margaret L. Davis
Deputy Clerk

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States. The pertinent provisions of the National Labor Relations Act, 61 Stat. 136, 29 U.S.C., Sec. 151, et seq., are Section 2 (3), (9), Section 7, Section 8 (b) (1) (A), Section 8 (b) (4) (A), (B), (C) and (D), Section 8 (c), Section 9 (c) (3), and Section 13:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Sec. 2 (3). The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

"Sec. 2 (9). The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or

conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

"Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

"Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 . . ."

"(4) to engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a

particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work; . . ."

"Sec. 8 (c). The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

"Sec. 9 (c) (3). No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote . . ."

"Sec. 13. Nothing in this Act, except as specifically provided for herein shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

ILE COPY

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No. 316

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 511,
PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 316

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 511, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The question presented is whether Section 8(b)(1)(A) of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) proscribes peaceful picketing of an employer and boycott appeals to his customers and the ultimate users of his products, engaged in by a union which does not represent a majority of the employer's employees, for the purpose of securing recognition as the employees' exclusive bargaining representative.

The Board believes that the decision of the court below, holding petitioners' actions illegal, is correct. However, the decision below, insofar as it pertains to

picketing, is in conflict with that of the District of Columbia Circuit in *Drivers, Local No. 639* v. *National Labor Relations Board* (the *Curtis* case), decided November 26, 1958 (not yet reported), certiorari granted, 359 U.S. 965, No. 34, this Term. And, insofar as it pertains to boycott appeals, the decision below is in conflict with that of the Ninth Circuit in *National Labor Relations Board* v. *International Association of Machinists, Lodge 942* (the *Alloy* case), 263 F. 2d 796, pending on the union's petition for certiorari, No. 57, this Term.

As shown in the petition for certiorari in the *Curtis* case, No. 34 (pp. 7–8), the Board has decided about fourteen cases on the ground that Section 8(b)(1)(A) proscribes the type of activity involved here, and nine of these cases are pending in the courts.[1] Accordingly, the Board believes that the question presented is of importance. The correctness of the Board's interpretation of Section 8(b)(1)(A)—respecting picketing as well as consumer and customer boycott appeals—is in issue.

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[1] Four are before this Court: the instant case (No. 316); the *Curtis* and *Alloy* cases (Nos. 34 and 57); and *International Association of Machinists, Lodge No. 311* v. *National Labor Relations Board*, pending on the union's petition for certiorari in advance of judgment by the Court of Appeals (No. 317). The other five are pending in the various courts of appeals—see the Board's petition in No. 34, p. 8, n. 5, and, to the cases listed therein, should be added *United Hatters* v. *National Labor Relations Board*, No. 15,087 (C.A.D.C.).

Section 704(c) of the recent amendment made by Title VII of the Labor-Management Reporting and Disclosure Act of 1959 (Public Law 86–257, 73 Stat. 519),[2] adds to but, in the Board's view, does not modify the National Labor Relations Act in that it provides: "Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b)." The Board does not believe that it can fairly construe Section 704(c) of the new statute in light of the proviso without learning from the Court whether it was correct in its interpretation, before the passage of the new Act, of the impact of Section 8(b) upon picketing for recognition and or organizational purposes and upon other forms of appeals for such purposes. Accordingly, the Board is of the view that, as in *Curtis*, certiorari should be granted in this case.

The Solicitor General suggests that the following additional considerations may be relevant in the disposition of the cases now pending before the Court involving the so-called *Curtis* issue:

Section 704(c) of the new statute[3] adds to the National Labor Relations Act a provision (Section 8(b)

[2] This law was approved by the President on September 14, 1959, and the provisions of Title VII "take effect sixty days after the date of * * * enactment" (Section 707). The relevant provisions of this statute are set forth in the Appendix, pp. 6–9, *infra*.

[3] The relevant provisions of this section are set forth in the Appendix, pp. 8–9, *infra*.

(7)) which bans picketing for recognition or organizational purposes where: (A) the employer is lawfully recognizing another labor organization and a question concerning representation may not appropriately be raised under Section 9; (B) the employees have indicated, in a valid Board election conducted during the preceding 12 months, that they do not desire a union representative; or (C) the picketing has been going on for an unreasonable period of time without a representation petition having been filed by the Board. Insofar as future cases are concerned, therefore, the Board will be able to regulate picketing of the type involved here under this new specific provision, rather than under the general provisions of Section 8(b)(1)(A). In accordance with the general principle that an injunction having only prospective effect will be modified in the light of changes of law which subsequently occur (see *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421, 431–432), it would seem that the cease and desist orders issued in cases previously decided under Section 8(b)(1)(A) would, at least insofar as they pertain to picketing, now have to be read in the light of the conditions imposed by the new Section 8(b)(7). This is apparently what the Conference Report means when, with reference to the proviso to Section 8(b)(7) mentioned above, it states that: "Section 8(b)(7) overrules the *Curtis* and *Alloy* cases to the extent that those deci-

sions are inconsistent with section 8(b)(7)" (H. Rep. No. 1147, 86th Cong., 1st Sess., p. 41).

These additional considerations may, in the Court's view, warrant remand of the instant case and the other pending cases[1] involving the so-called *Curtis* problem to the respective courts below or to the Board for further examination in the light of the recent amendments to the Act. As previously noted, however, *supra*, p. 3, the Board is, for the reasons stated, of the view that certiorari should be granted in this case.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
THOMAS J. MCDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
Deputy Assistant General Counsel,
National Labor Relations Board.

OCTOBER 1959.

[1] Copies of this memorandum are also being served on counsel in the three other pending cases (Nos. 34, 57, and 317).

APPENDIX

The Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 542, Pub. Law 86-257) amending the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) provides, in relevant part:

BOYCOTTS AND RECOGNITION PICKETING

SEC. 704. (a) Section 8(b)(4) of the National Labor Relations Act, as amended, is amended to read as follows:

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organiza-

tion has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another em-

ployer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;".

* * * * * *

(c) Section 8(b) of the National Labor Relations Act, as amended, is amended by striking out the word "and" at the end of paragraph (5), striking out the period at the end of paragraph (6), and inserting in lieu thereof a semicolon and the word "and", and adding a new paragraph as follows:

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

"(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

"(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the

Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)."

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EFFECTIVE DATE OF AMENDMENTS

SEC. 707. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act and no provision of this title shall be deemed to make an unfair labor practice any act which is performed prior to such effective date which did not constitute an unfair labor practice prior thereto.

Approved September 14, 1959.

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